LIM CHENG KWANG

v.

SIVAMALAI D/O SINNATHAMBI & ANOR.

HIGH COURT, KUALA LUMPUR
TUAN EE CHIN SENG JC
[O.S. NO. F31-2315-86]
17 DECEMBER 1993

PROBATE AND ADMINISTRATION: Vesting of property of an intestate movable and immovable property until administration is granted shall vest in Official Administrator - Power of personal representative to dispose of property - Agreement between plaintiff and deceased/husband of defendant - Whether agreement was for friendly loan or sale/purchase agreement - Property transferred and registered in name of 2nd defendant without consent from all beneficiaries of estate of deceased/plaintiff's father - Whether transfer and registration exercise was premature and void for want of legal rights - Sections 39(1) & 60(1), (2), (3) and (4) Probate and Administration Act 1959, s. 340(5) National Land Code Act 56/65 - Whether registered title of late Lim Hock Seng to said land is indefeasible - Section 30 Contracts Act 1950 - Whether agreement void for uncertainty.

The plaintiff, an administrator of the estate of Lim Hock Seng, deceased filed an action by way of a originating summons against the defendants, both the administrators of the estate of Muthusamy s/o Sinniah, deceased, for a declaratory order that the transfer and registration of land held under EMR No. 1324 for Lot 4 Mukim of Slim in favour of the defendants is unlawful null and void and for other consequential orders.

Held:

[1] The indefeasibility of the title of the registered owners has not been defeated by the land having been transferred and registered in the name of the 2nd defendant without the consent and knowledge of all the beneficiaries who are equally entitled to the ownership of the said property. Also such transfer of ownership was not in compliance with the provisions of ss. 39(1) & 60(1), (2), (3) and (4) of the Probate and Administration Act 1959.

[2] The transfer and registration exercise was premature and void for want of legal rights because no notice was given to and consent obtained from all the beneficiaries of the administration of the estate of Lim Hock Seng, deceased. In short no one can enjoy a right when no right was bestowed upon oneself.

[3] The defendants are not entitled in law or at all to deal with the property known as EMR 1324 for Lot 4, Mukim of Slim, Perak before the same has been transmitted to the plaintiff as administrator of the estate of the late Lim Hock Seng, deceased and without the consent of all the beneficiaries of the said estate.

[4] Upon careful perusal and consideration of all the affidavit evidence and documents and the submissions by both Counsel, the plaintiff's application was allowed with order in terms of the prayers asked for in the said application.

[Plaintiff's application allowed. Order in terms of the prayers].

Legislation referred to:
Contracts Act, s. 30
National Land Code, s. 340(5)
Probate & Administration Act 1959, ss. 39(1) & (2), 60(1), (2), (3) & (4)(a)

For the plaintiff - Vincent; M/s. Vincent Lim & Teoh
For the defendant - M/s. Albar Zulkifly & Yap

JUDGMENT

Ee Chin Seng JC:

Facts derived from affidavits and documents

One Lim Cheng Kwang, an administrator of the estate of Lim Hock Seng deceased filed an action by way of an originating summons *vide* O.S. No. F31-2315-86 against one Sivamalai d/o Sinnathambi (f) and Subramaniam s/o Muthusamy, both administrators of the estate of Muthusamy s/o Sinniah deceased as 1st defendant and 2nd defendant respectively for a declaratory order pertaining to the transfer of a piece of property. The order seeks:

(i) to declare that the inclusion of the land held under EMR No. 1324 Lot 4 Mukim of Slim as an asset in grant of Letters of Administration No. 84/82 dated 23 February 1982 of the estate of Muthusamy s/o Sinniah is unlawful and null and void;
(ii) to declare that the registration dated 4 June 1984 and endorsed on the document of title to the said land to the effect that the defendants are the registered owners as represented is unlawful, null and void and to direct the Pemungut Hasil Tanah to abrogate the said endorsement;

(iii) to set aside Court order issued on 16 October 1984 *vide Ex-Parte* O.S. No. P1105/84 in so far as it gives leave to the 1st defendants to transfer/distribute the said land which is stated as item No. 14 in the Particulars of Distribution to the 2nd defendant absolutely;

(iv) to declare that the registration endorsed on the document of title to the said land to the effect that the 2nd defendant is the registered owner of the said land is unlawful, null and void and to direct the Pemungut Hasil Tanah to abrogate the said endorsement etc,

In this supporting affidavit (Encl. 2) the plaintiff deposes briefly, *inter alia*, the following facts:

(a) The late Lim Hock Seng died intestate in 1980 was the registered owner of the land (hereinafter called the said land) held under EMR No. 1324 Lot No. 4, Mukim of Slim, Perak holding $^1/_2$ share of the said land absolutely and the other $^1/_2$ share as trustee;

(b) Only in 1973, that is, 23 years later the plaintiff filed petition for grant of Letters of Administration *vide* Ipoh Court Petition No. 602/73 of the estate of Lim Hock Seng deceased (hereinafter called Grant of L/A of Lim Hock Seng) and Grant of L/A. was subsequently issued on 9 April 1986 to the plaintiff some 13 years later. Due to inadvertence instead of the said land being included in the said Grant of L/A of Lim Hock Seng as an asset but only the $^1/_2$ share held by the deceased absolutely had been so included. Since then the plaintiff had taken the necessary steps to rectify that error to have the other $^1/_2$ share held on trust to be so included;

(c) The said land had been included as an asset in Grant of L/A. of Muthusamy to the 1st defendants as administrators of the estate of Muthusamy deceased (hereinafter called Grant of L.A. of Muthusamy dated 23 February 1982) on the purported ground that Muthusamy deceased had "equitable ownership of the said land sold to him by agreements dated 19 April 1958 and 5 June 1964;

(d) By virtue of that claim the said land was transmitted to themselves (1st defendants) as representatives and duly registered on 4 June 1984. Then the 1st defendant made an application to the Kuala Lumpur High Court *vide Ex Parte* O.S. No. F1105/84 for leave to transfer the said land to the 2nd defendant absolutely and this was granted on 16 October 1984. Since then the said land had been transferred and registered in the 2nd defendant absolutely;

(e) Deponent/plaintiff contends that such inclusion of the said land as an asset in the Grant of L.A. of Muthusamy is unlawful, null and void on the grounds that:

(i) the late Muthusamy was not a beneficiary of the estate of the late Lim Hock Seng; and

(ii) under s. 340 of the National Land Code the registered title of the late Lim Hock Seng to the said land is indefeasible;

(f) It was not right to claim that the said land was transferred to the 1st defendant as administrator because the Estate of the late Muthusamy obtained the "equitable ownership of the said land which was sold to late Muthusamy. The grounds are:

(i) The grant of L/A of Lim Hock Seng deceased was not issued to the plaintiff until 9 April 1988 and without this Grant the plaintiff had no *locus standi* to apply to Court for leave to transfer the said land as administrator as required by law under s. 60(4)(a) of the Probate & Administration Act;

(ii) The two agreements dated 19 April 1958 and 5 June 1964 respectively should be read together as a single agreement otherwise it is void as a whole or void separately for uncertainty under s. 30 of the Contracts Act;

(iii) Agreement was made for money lent but onus is on the 1st defendants to produce a Court order giving leave to the plaintiff to charge the said land to the 1st defendant or defendants;

(iv) Whatever the claim made by the 1st defendants it is now barred by reason of the statute of limitation.

To the above affidavit the said Subramaniam s/o Muthusamy, as co-administrator and second defendant, filed an affidavit in reply on his own behalf as well as for the mother, Sivamalai d/o Sinnathambi (f), the other co-administrator of the estate of Muthusamy s/o Sinniah

deceased (Encl. 4) deposes, *inter alia*, briefly as follows:

(a) His father, the late Muthusamy purchased a single storey shophouse known as EMR 1324, Lot No. 4, Mukim of Slim, Daerah Batang Padang, that is, No. 4, Taylor Street, Slim Village, Perak (hereinafter called the said property) from the plaintiff whose capacity was the intended administrator of the estate and lawful son of Lim Hock Seng, deceased who was then the registered proprietor *vide* an agreement dated 19 April 1958 for RM3,300;

(b) In that agreement it was intended by both parties such sale of the said property to be a total and outright sale. It was provided under the agreement that the plaintiff as vendor shall cause such transfer of the said property once L.A. and order for sale had been granted to him. Only in the event that the plaintiff failed to secure the L.A. and order for sale then the sum of RM3,300 be repaid to the late Muthusamy in spite of the terms 'friendly lender and borrower' being used;

(c) Nowhere in the said agreement was it stated that the deceased held $^1/_2$ share of the said property absolutely with the remaining $^1/_2$ as trustee;

(d) Deponent's father, that is, the late Muthusamy took possession of the said property, took custody of the title document, entered a caveat on 14 July 1958 to prevent the plaintiff from dealing with it, paid quit rent, assessment and other rates of the said property from 1958;

(e) By 1964 the plaintiff still failed to extract the L.A. of Lim Hock Seng who died in October 1949, both the plaintiff and his younger brother, Lim Chin Len gave another undertaking *vide* an agreement dated 5 June 1964 to extract the L.A. and to effect transfer of the said property to the late Muthusamy.

After the death of Muthusamy in spite of several requests made by the deponent to them to take necessary action failing that he would include it as part of his late father's assets in the application for L.A. but of no avail;

(f) The deponent was forced, under such circumstances, to instruct his solicitors to include the said property in his late father's list of assets when petitioning for L.A. on 9 February 1982 at the Kuala Lumpur High Court. This said property was listed as by way of equitable ownership sold to the deceased under an agreement dated 19 April 1958 and 5 June 1964. It was valued at about RM15,000;

(g) L.A. was obtained and the said property was transferred to the deponent and the mother as co-administrators, later transferred to the deponent solely and absolutely;

In refuting the plaintiff's allegation of unlawfulness, illegality etc. defendant deposes that:

(1) the plaintiff is guilty of delay and laches in not taking out the L.A. within a reasonable period as expressly undertaken by him and cause the transfer of the said property to his late father. It took 36 years to extract the grant of L.A.

(2) the plaintiff took no action to extract the L.A. grant nor making the refund of RM3,300 as per terms of the 1958 agreement. In short, the plaintiff on one hand keeps the money and on the other hand also retains the said property.

(3) Admittedly the late father, Muthusamy was not a beneficiary of the estate of Lim Hock Seng but the said property should be transferred to Muthusamy who had given valuable consideration of RM3,300. Thus s. 340 of the National Land Code is inapplicable for the question of indefeasibility of title interest of the deceased Lim Hock Seng does not arise.

(4) The two agreements are not money lending agreements though the terms of "borrower and friendly lenders" are used in them. To-date no repayment or refund of this sum of RM3,300 was made by the plaintiff to the deponent or other administrators.

(5) Limitation does not set in because the plaintiff has failed to abide by his undertaking and neither is there limitation being specified in both agreements.

(6) The inclusion of the said property in the list of assets in the administrators' petition for L.A., the subsequent Order of Distribution and the registration of transfer by the Pemungut Hasil Tanah is valid and proper.

Further to his affidavit of Encl. 2, the plaintiff filed an affidavit of Encl. 17 duly affirmed on 30

September 1991 with the intention of clarifying the factual situation and allegation made by the defendants. The deposition states, *inter alia,* briefly:

(a) The plaintiff's late father, Lim Hock Seng died intestate in 1950 with 4 lawful surviving children namely:

(i) Lim Cheng Kwang (i.e. the plaintiff);
(ii) Lim Ah Kau
(iii) Lim Swee Cheng and
(iv) Lim Cheng Len.

who are the lawful beneficiaries of the estate of Lim Hock Seng with each of them entitled equally to the said property.

(b) The plaintiff petitioned for the grant of L.A. *vide* Petition No. 602/73 where the said property was included in the estate of Lim Hock Seng. A copy of the title of the said land reveals that the late Lim Hock Seng was the registered joint proprietor of the said land with one Ong Koo (f) who was the plaintiff's paternal grandmother who passed away in 1951. Her interest of the said property was held in trust by the said Lim Hock Seng.

(c) After the death Ong Koo's interest in the land devolved upon the estate of the late Lim Hock Seng. Therefore, the said land could not have been legally transferred to the 1st defendant and subsequently to the 2nd defendant in January 1985 on the following grounds:

(i) The Grant of L.A of the Estate of Lim Hock Seng was only obtained by the plaintiff on 9 April 1986 and therefore no legal transfer of the said property could have been effected for there was no concurrence of all the beneficiaries.
(ii) The plaintiff, as administrator of the estate of Lim Hock Seng, did not make any application to the Court as to any sale, transfer, conveyance in respect of the said land.
(iii) The administrator i.e. the plaintiff was not made a party to the defendant's application to transfer the said land to themselves.
(iv) At the time of the alleged transfer of the said land to the defendants there was no devolution of the estate of Lim Hock Seng to the beneficiaries as yet. There was also no privity of any contract whatsoever between the late Lim Hock Seng and one Ong Koo (f) deceased with the late Muthusamy in respect of the said land.

For the reasons enumerated above the transfer of the said property *vide* the two agreements dated 19 April 1958 and 5 June 1964 was wrongful, illegal, null and void.

(d) The said agreement of 1958 was a loan agreement and not a sale and purchase agreement. The document of title to the said land was deposited with the late S. Muthusamy only as a security for the said loan.

(e) The signature on the agreement dated 5 June 1964 was not the plaintiff's signature. It was written by the plaintiff's brother, Lim Cheng Len without the plaintiff's knowledge. The said Lim Cheng Len told the plaintiff that he was asked to sign the said agreement when he borrowed some movies from the late S. Muthusamy. This was confirmed by Lim Cheng Len in his affidavit and a statement to police that he forged the plaintiff's signature.

(f) The said agreement of 1958 was prepared at the instruction of the late Muthusamy as he was not conversant in English language. He was told by the late Muthusamy that this was only a loan agreement and the sum of money that the plaintiff borrowed would be repaid from the rental due from the late Muthusamy. If it was a sale agreement such terms like "loan", "borrower", "friendly lender", "security for the said friendly loan", would not be found there.

(g) The plaintiff was not informed of the 2nd defendant's intention to effect a transfer of the said land. In any event he contends that inaction on his part does not entitle the defendants in law or otherwise to effect the transfer without making the beneficiaries parties to it.

(h) The plaintiff contends that no amount of delay and laches could defeat the beneficiaries' rights to the said land especially the transfer was fraudulently done without the knowledge or consent of the beneficiaries when moving the High Court in granting the said Order.

(i) The said land belongs to all the beneficiaries equally and no amount of action or omission on the part of the plaintiff can negate the rights of the other beneficiaries to the said land.

(j) Thus the inclusion by the 1st defendant of the said land in the Petition for L.A of the estate of Muthusamy is unlawful, invalid and improper and the subsequent dealings and/or transfer of the said land is unlawful, invalid, null and void.

(k) With regard to the loan taken by him from the late Muthusamy the plaintiff claims that the same has been repaid by way of contra against the rental on the said land. Whatever it is, it is an issue between the plaintiff and the defendants which has no relevance to the issue of wrongful transfer of the said land.

Concise relevant facts of the case

Prior to the execution of the agreement (Exhibit S1) dated 19 April 1958 purportedly entered into between the plaintiff and the late Muthusamy pertaining to the said property the said Muthusamy was renting it for RM30 per month. At that material time it was registered in the name of the plaintiff's father, Lim Hock Seng who died on 2 October 1950 and Ong Koo (f), the latter being the mother of the said Lim Hock Seng. The late Muthusamy gave a sum of RM3,300 to the plaintiff and this sum was to be repaid only if the plaintiff could not obtain an order to sell the intestate property to him but Muthusamny was allowed to continue to occupy the property at a monthly rental of RM30. The plaintiff applied for L.A sometime in 1973 and was granted the L.A on 18 October 1976 but grant was only extracted on 9 April 1986. The late Muthusamy and later the defendant had been paying all quit rent, assessments etc. and had general care of the property and the building which has been used to run a sundry goods shop till today. The late Muthusamy had lodged a caveat against the said property.

After the death of Muthusamy, the widow and the son (1st and 2nd defendant) in their petition for grant of L.A had included the said property as an equitable interest. L.A. was granted to the defendants on 23 February 1982. By virtue of the personal representatives of the administration of the estate of Muthusamy the said land was transmitted to the defendants on 4 June 1984 on the basis that the deceased had "equitable ownership of the said land" sold to him based on the agreements of 19 April 1958 and 5 June 1964. Then the 1st defendant made an *Ex Parte* application to the High Court, Kuala Lumpur *vide* O.S. No. F1105/84 for leave to transfer the said land to the 2nd defendant absolutely. This was granted on 16 October 1984 and since then the land had been transferred and registered in the name of the 2nd defendant absolutely.

Grounds of Decision

After careful perusal and consideration of all affidavit evidence and documents and the submissions by both Counsel the Court allows the plaintiff's application with orders in terms of the prayers asked for. It is the considered opinion of the Court that the defendants are not entitled in law or at all to deal with the property known as EMR 1324 Lot 4, Mukim of Slim, Perak before the same has been transmitted to the plaintiff as administrator of the estate of the late Lim Hock Seng without the consent of all the beneficiaries of the said estate. The Court therefore makes a declaratory order that:

(i) the inclusion of the land held under EMR. No. 1324 Lot 4, Mukim of Slim as an asset in the Grant of L.A. No. 84/82 dated 23 February 1982 of the estate of the late Muthusamy s/o Sinniah is unlawful, null and void.

(ii) the registration dated 4 June 1984 and endorsed on the document of title to the said land to the effect that the 1st defendants are the registered owners as representives is unlawful, null and void. Accordingly this Court orders that such endorsement is to be abrogated.

(iii) Thus, an Order of the Court issued on 16 October 1984 in the *Ex Parte* O.S. No. F1105/84 giving leave to the 1st defendant to transfer/distribute the said land (item No. 14 in the particulars of distribution) to the 2nd defendant absolutely is set aside and of no effect.

(iv) The declaration that the 2nd defendant is the registered owner of the said land is unlawful and void.

Costs of this proceeding are to be borne by the defendants.

The defendants being dissatisfied with the above decision now appeal against such order and decision.

Legal Issue or Issues

The whole "transaction" pertaining to the said property hinges on the interpretation of the two agreements in question. The defendants claim

that the late Muthusamy was a purchaser of the said property for value i.e. RM3,300 which was paid to the plaintiff in this case but the plaintiff refutes such assertion by contending that it is a loan agreement, pure and simple and the deposit of document of title was for security of the said loan. So much and so sharp are the contrasting and divergent views of both parties.

Salient points advanced by defence in defending, the legality and validity of such transfer of the said property to the 2nd defendant are enumerated below:

(a) In a transaction, a purchaser for value of a property pending transfer of the property in his name is a beneficiary under equity whilst the vendor is a trustee in which a bare trust comes into existence.
(b) Claims that the proviso under s. 340 of the National Land Code 1965 gives protection to the defendants in that "in case of fraud, misrepresentation, forgery and unlawful acquiring of title or interest the title shall be liable to be set aside provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration or by any person or body claiming through or order such as purchaser".
(c) Equitable principle demands that the plaintiff must transfer the said property to the defendants as the legal representatives of the deceased purchaser for value on the strength of the 1958 agreement and subsequent written undertaking of 1964. In the event of refusal by the plaintiff the defendants have the legal remedy to seek Court's order of specific performance.
(d) The plaintiff had committed delay and laches in carrying out the terms of the agreement and the undertaking in the subsequent agreement.

On the other hand, the plaintiff raises only one issue pertaining to this whole transaction namely a legal issue under s. 39(1) of the Probate and Administration Act 1959 and also under s. 60(1), (2), (3) and (4) of the same Act which deal with vesting of property of a deceased who died intestate and the power of personal representatives to dispose of property respectively.

Essentially defence justifies the defendants' action in having the said property included in the asset of the estate of the late Muthusamy, then transferred it to both administrators to be followed by a subsequent Court order to be transferred to and registered in the name of the 2nd defendant absolutely on the strength of the said 1958 agreement and a subsequent written undertaking of 5 June 1964 and equitable principle of having acquired an equitable ownership of the said property.

The subject-matter of this whole controversy between parties is the land, an immovable property which is governed and regulated by the provision of the National Land Code 1965. As to its disposal in the case of intestate it is guided, controlled and regulated by a very specific piece of legislature namely the Probate and Administration Act 1959. Section 39(1) of the said Act prescribes that:

> whoever person dies intestate, his movable and immovable property until administration is granted in respect therefore shall vest in the Official Administrator in the same manner and to the same extent as it vests in the Probate Judge in England and s. 39(2) states that "on the making of an order for a grant of administration by the Court all such property shall vest in the administrator.

Applying the given facts of this instant case to the above provision of the said Act they fit in the situation on the similar ground. The registered owner of the said land died intestate i.e. Lim Hock Seng deceased holding, $^1/_2$ share of the land with the other half being in the hand of his mother, Ong Koo (f). Thus, this immovable property shall vest in the hand of an Official Administrator pending the application and/or granting of an L.A. Events proved that it took the plaintiff a long time to apply for and obtain the grant of the L.A. pending that event the defendants somehow had the said property in question transferred to themselves as administrators and subsequently the 2nd defendant (i.e. the son of the deceased) absolutely. This runs foul with the provision of s. 39(1) and (2) of the said Act in that by right the property for the time being should be vested in the hands of the Official Administrator but instead have gone to the Personal Representative of the estate of Muthusamy deceased. Connected with this s. 60(2) of the same Act specifically deals with the power of personal representative in disposing of property. It states that

> Unless the Court otherwise directs, no sale, transfer, conveyance or assent in respect of immovable property shall be made without the concurrence of all the personal representatives of the deceased ...

Applying the given facts of this instant case again it is quite clear that the defendants as administrators of the estate of the late Muthusamy have violated the provision of s. 60(2) of the same Act in that no evidence of concurrence of all the personal representatives of the deceased had been obtained before the transfer and registration of the said property. This renders the said transfer as no transfer at all and it should be *void ab initio* for failure to comply with the requirement in s. 60(2) of the said Act. The strict and stringent provision of this statute i.e. Probate and Administration Act 1959 ensures the interest of all the beneficiaries are protected. It is therefore understandable that all process and procedure relating to the vesting of power and power of disposal are to be adhered strictly.

From the wordings of the said agreement of 19 April 1958 it is quite clear that it is a loan agreement whereby the plaintiff borrowed RM3,300 from the 2nd defendant's late father, S. Muthusamy depositing a document of title of the said property with the lender as security. The said lender was the tenant of the said property, a shop house which the said Muthusamy used to run his sundry goods provision shop at a monthly rental of RM30. Under this agreement the tenant shall cease to pay monthly rental from 19 April 1958 until such time the property was finally sold, transferred and assigned to the lender for the sum of RM3,300. There is a clause of reverting parties to original positions of landlord and tenant in the event that within one month of refusal of the Court to grant the order of sale by the Court, the lender shall be refunded the said sum of RM3,300 and shall continue thereafter to pay monthly rental of RM30. There is no time frame in the agreement and it can safely be said that time is not the essence for parties to perform their obligations. When both the borrower and lender entered into this loan agreement they knew very well that there could not be an outright sale or transfer because the said property did not belong to the plaintiff/borrower but that of the plaintiff's deceased father. Certain steps as prescribed by law such as applying for the grant of L.A. and Court order of transfer and sale must be complied with before any transfer could be effected in respect of the said property. Admittedly there was a long lapse of time and unreasonable delay in applying for the grant of L.A. on the part of the plaintiff. However, these inactions are not valid excuses for the defendants to bypass the statutory procedure to effect transfer of ownership of property from the estate of an intestate to themselves who are not beneficiaries of the estate of Lim Hock Seng, worst still without the knowledge and consent of the beneficiaries of the said estate of Lim Hock Seng. Until the grant of L.A. is obtained by the plaintiff and with the consent of all the beneficiaries no one is empowered by law to have the intestate's properly transferred and if so transferred it was not valid but void.

Equally the late S. Muthusamy was plagued with this shortcoming of laches for not pressing hard on the plaintiff to take the necessary steps to take out the grant of L.A. and thereafter to transfer the ownership of the said property to himself within the reasonable time. There are civil remedies which the late S. Muthusamy could resort to in order to enforce his rights if there was any with regard to the proprietary right of the property if he considered it to be a genuine purchase of property for value and not a mere loan agreement. He chose not to take any action. Hence, the principle of laches cannot therefore be applied to the plaintiff only as there was no time frame or deadline so to speak to carry out that obligation. The principle of laches is therefore inapplicable under the circumstances.

In conclusion in the light of the above I allow the plaintiff's application for the declaratory order in terms of the prayers (1), (2), (3) and (4) with costs. I also hold that:

(1) there could be no outright transfer of ownership of the said property which is an item of the assets of the administration of the estate of Lim Hock Seng without satisfying the requirements under s. 39(1) and s. 60(1), (2), (3) and (4) of the Probate and Administration Act 1959.

(2) The principle of laches is not applicable to the plaintiff as there exists no time frame or deadline compelling the plaintiff to apply and extract an order of the grant of L.A. and to obtain Court order of sale and transfer. On the contrary, the late Muthusamy, father of the second defendant, could have taken legal action during his lifetime to enforce his rights by requiring him to carry out the terms as spelt out in the agreement and the written undertaking.

(3) Section 340(5) of the National Land Code 1965, which caters for the protection of a

purchaser of property for value which transaction is not tainted with fraud, misrepresentation, forgery and unlawful acquiring of title or interest. Given facts of the present case do not afford the defendants the legal protection simply because the agreement is a friendly loan agreement executed between the plaintiff as borrower and the late Muthusamy as the friendly lender and the indefeasibility of the title of the registered owners has not been defeated by the land having been transferred and registered in the name of the 2nd defendant without the consent and knowledge of all the beneficiaries who are equally entitled to the ownership of the said property especially if such transfer of ownership was not in compliance with the provisions of ss. 39(1) & s. 60(1), (2), (3) and (4) of the Probate and Administration Act 1959.

(4) At the time of the transfer and registration of the ownership of the said property from the estate of Lim Hock Seng to the 2nd defendant the defendants' rights under the 1958 agreement have not arisen because no grant of L.A. was obtained by the plaintiff yet and also a Court order of sale and transfer had yet to be obtained. This transfer and registration exercise was premature and void for want of legal rights because no notice was given to and consent obtained from all the beneficiaries of the administration of the estate of Lim Hock Seng. In short no one can enjoy a right when no right is bestowed upon oneself.

I order the above terms as prayed with costs.

MAJUKAYU SDN. BHD. & ANOR.

v.

WONG PEK SHONG & ANOR.

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[CIVIL APPEAL NO. 12-29-92(92)]
11 DECEMBER 1993

PRACTICE AND PROCEDURE: Setting aside judgment by default - Summons served on both defendants - Notice of appearance and statement of defence not filed - Application to set aside default judgment was dismissed by Sessions Judge - Whether affidavits of appellants disclose a defence on the merits or an arguable or triable issue.

This was an appeal against the decision of the Sessions Court, Lenggong which dismissed an application by the appellants to set aside the default judgment given on 12 November 1991. Hence, this appeal.

Held:

[1] The question for this Court to consider is whether the affidavits of the appellants as set out above disclose a defence on the merits or an arguable or triable issue.

[2] Failure to file the statement of defence should not be an obstacle to set aside the default judgment. The Sessions Judge failed to consider the defence of the appellants as shown in the affidavits. Sufficient reasons were advanced for the appellants' absence on 12 November 1991 but unfortunately they were rejected by the Sessions Judge.

[3] The affidavits of the appellants has shown a defence on the merits or at least there is an arguable case or an issue which should go for trial, the appellants' appeal was allowed.

[4] The appellants were given an enlargement of time to file their defence within three weeks from the date of this judgment.

[Appeal allowed. Default judgment set aside. Enlargement of time given to file statement of defence. Appellants to pay costs of appeal].

Cases referred to:

Million Group Credit Sdn. Bhd. v. Lee Shoo Khoon & Ors. [1986] 1 MLJ 315 ***(cit)***

Seng Huat Hang Sdn. Bhd. v. Chee Seng & Co. Sdn. Bhd. [1986] 1 MLJ 348 ***(cit)***